Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-296 OF 1990
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
10 JANUARY 1992

Insurance *— Personal accident policy — Cause of injury — Permanent disability — Whether there was non-disclosure of facts — Whether there was failure to inform insurer of accidents within 14 days*

The respondent, a superscale technical assistant in the Public Works Department in Johore, had taken out a personal accident policy with the appellant. The respondent met with two accidents as a result of which he claimed to be permanently disabled. The respondent made a claim under the policy and when the claim was rejected, he brought an action in the High Court. It appeared from the evidence that the accidents in this case had the effect of inducing the rare condition known as Sudeck's osteodystrophy and at the same time made the haemorrhoids, cervical spondylosis and labile hypertension which was suffered by the respondent worse. At the trial the following three issues were raised:

(1) Has the plaintiff suffered bodily injury which has resulted in permanent total disablement as defined in the policy?
(2) Is the defendant entitled to repudiate the said policy on the ground of non-disclosure of material facts at the time of executing the proposal form in that the plaintiff failed to disclose that he was then allegedly suffering from various diseases?
(3) Is the defendant entitled to repudiate the plaintiff's claim on the ground of breach of policy condition, ie Condition No 7, which requires notice to be given to the defendant within fourteen (14) days of any accident that is likely to give rise to a claim?

The learned trial judge gave judgment in favour of the respondent (see [1990] 3 MLJ 312) and the appellant appealed. At the hearing of the appeal three issues were raised, namely, the cause of the injury, the non-disclosure of facts and the failure of the respondent to inform the appellant within 14 days of the accident.

Held, dismissing the appeal:

(1) Having considered the evidence and the submissions of counsel on the first issue, the court agreed with the learned judge's finding that the bodily injury suffered by the respondent was solely and independently caused by the two accidents in the sense that they were the proximate cause of his permanent disablement in this case and had prevented him from continuing his occupation as a technical assistant in the Public Works Department.

(2) Applying a fair and reasonable construction on the question in the proposal form, the court did not consider as a matter of fact that it was material for the respondent to have disclosed in the proposal form that he had early cervical spondylosis, haemorrhoids, labile hypertension or peptic ulcer as they are not serious diseases or illnesses of the same genus as those mentioned earlier in the said question. The respondent was therefore not entitled to repudiate the policy on the ground of non-disclosure of material facts.

(3) The court agreed with the learned judge that by applying the contra proferentem rule the court should construe condition 7 in relation to the giving of notice against the appellants. The appellant had failed to show that the condition was made a condition precedent to its liability and the respondent is therefore not precluded from recovering under the said policy.

[Bahasa Malaysia Summary

Di dalam kes ini responden yang dulunya pembantu teknik superscale di dalam Jabatan Kerja Raya di Johore telah mengambil polisi insurans kemalangan diri dari perayu. Responden telah mengalami dua kemalangan dan akibatnya ia mendakwa ia telah mengalami kecacatan yang kekal. Responden membuat tuntutan di bawah polisi itu dan apabila tuntutannya ditolak ia mengambil tindakan di mahkamah. Dari keterangan yang diberi nampaknya kemalangan-kemalangan di dalam kes ini telah berkesan menyebabkan keadaan luar biasa yang dinamakan Sudeck's osteodystrophy dan pada masa yang sama menjadikan penyakit haemorrhoids, cervical spondylosis dan labile hypertension yang dialami oleh responden lebih teruk. Di dalam perbicaraan kes tiga isu telah ditimbulkan iaitu:

(a) Adakah plaintif mengalami kecederaan badan yang menyebabkan kecacatan sepenuh yang kekal seperti yang ditakrif di dalam polisi?

(b) Adakah defendan berhak menolak polisi itu atas alasan plaintif tidak menzahirkan fakta penting apabila mengisikan borang cadangan iaitu plaintif tidak memberitahu ia mengalami beberapa penyakit?

(c) Adakah defendan berhak menolak tuntutan plaintif atas sebab kemungkiran syarat polisi iaitu syarat 7 yang memerlukan notis diberi kepada defendan dalam masa 14 hari dari tarikh kemalangan yang boleh menimbulkan sesuatu tuntutan?

Hakim yang arif telah memberi penghakimannya bagi pihak responden dan perayu telah merayu. Di dalam rayuan itu tiga isu telah ditimbulkan iaitu punca kecederaan itu, kegagalan menzahirkan fakta dan kegagalan responden memberitahu perayu dalam masa 14 hari dari tarikh kemalangan itu.

Diputuskan, menolak rayuan itu:

(1) Selepas menimbang keterangan-keterangan dan hujah peguam atas isu pertama, mahkamah bersetuju dengan pendapat hakim yang arif bahawa kecederaan jasmani yang dialami oleh responden

adalah hanya dan semata-mata disebabkan oleh dua kemalangan itu dengan ertikata bahawa ianya adalah sebab yang terdekat yang menyebabkan kecacatan yang kekal yang terjadi di dalam kes ini dan ia telah menyebabkan responden tidak boleh meneruskan pekerjaannya sebagai pembantu teknik di Jabatan Kerja Raya.

(2) Dengan menggunakan tafsiran yang berpatutan dan munasabah ke atas soalan di dalam borang cadangan, mahkamah tidak berpendapat sebagai satu perkara fakta bahawa adalah mustahak responden memberitahu di dalam borang cadangan itu bahawa ia telah mengalami penyakit cervical spondylosis, haemorrhoids, labile hypertension atau peptic ulcer yang awal oleh kerana penyakit itu bukan penyakit yang berat atau genting sama dengan jenis-jenis penyakit yang disebut sebelum itu di dalam soalan itu. Responden oleh kerana itu tidak berhak menolak polisi atas alasan ketidakzahiran fakta penting.

(3) Mahkamah juga bersetuju dengan yang arif hakim bahawa dengan menggunakan kaedah contra proferentem mahkamah hendaklah mentafsirkan syarat 7 mengenai pemberian notis berlawanan dengan perayu. Perayu telah gagal membuktikan syarat itu adalah syarat terdahulu untuk menimbulkan tanggungannya dan responden oleh kerana itu tidak dihalang mendapat bayaran di bawah polisi itu.]

Cases referred to

1 *Pocok v Century Insurance Co Ltd* [1960] 2 Lloyd's Rep 150 (folld)
2 *Cassel v The Lancashire and Yorkshire Accident Insurance Co (Ltd)* (1885) 1 TLR 495 (distd)
3 *Jason v Batten* [1969] 1 Lloyd's Rep 281 (distd)
4 *Fidelity & Casualty Co of New York v Mitchell* (1917) 117 LT 494; [1917] AC 592 (refd)
5 *Williams v Lloyd's Underwriters* [1957] 1 Lloyd's Rep 118 (refd)
6 *Lawrence v The Accidental Insurance Co (Ltd)* (1881) 7 QBD 216 (refd)
7 *Connecticut Mutual Life Insurance Co of Hertford v Moore* (1881) 6 App Cas 644 (refd)
8 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 (folld)
9 *Stoneham v The Ocean, Railway & General Accident Insurance Co* (1887) 19 QBD 237 (folld)

Appeal from: Civil Suit No 841 of 1985 (High Court, Johore Bahru)

RA Kumar (*Varughese Kumar Netto & Partners*) for the appellant.
N Jagatheeson (*John Ang & Jaga*) for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): *Facts of the case*

R Kathirvelu (hereinafter referred to as 'the plaintiff') was a superscale technical assistant in the Jabatan Kerja Raya in the state of Johore. Since

1977 he had been taking out a personal accident policy on a yearly basis with Pacific & Orient Insurance Co Sdn Bhd (hereinafter referred to as 'the defendant'). On 17 June 1983, the plaintiff was issued a renewal of the personal accident policy for the period 19 June 1983 to 18 June 1984, which provided, inter alia, for the payment to the plaintiff of a sum of $200,000 on the terms and conditions contained in the said policy. In the said policy, it is provided that 'if during the period of insurance the insured shall sustain any bodily injury caused by violent external and visible means which injury shall solely and independently of any other cause result in his death or disablement the company will pay to the insured or to his legal personal representatives the sum or sums of money in accordance with the table of benefits set forth in the Schedule'. The said policy was issued pursuant to a proposal form signed by the plaintiff on 14 June 1983, and is similar to one shown on pp 134 and 135 of the appeal records. In the proposal form, there was a question No 11(a) which required the plaintiff to answer whether to the best of his knowledge and belief he had ever had hernia, cancer, epilepsy, vertigo, paralysis, tuberculosis, diabetes, any form of rheumatism, any disorder or disease of the mental, nervous, genito-urinary, digestive, cardio-vascular systems or any other disease. That question was answered in the negative and all the other answers and particulars in the said proposal form were entered by an agent of the defendant after the plaintiff had signed a blank proposed form.

During the currency of the said policy, the plaintiff met with two accidents. The first was on 29 October 1983, when he fell down the stairs at the Johore Bahru General Hospital and injured his right hand. He was given out-patient treatment and medical leave for two weeks and after recovery went back to work on 12 November 1983. The second accident was on 19 November 1983, when the plaintiff met with a motor vehicle accident and again suffered an injury to the same right hand. He was again given out-patient treatment and medical leave for six days and thereafter continued seeing the doctors at the Johore Bahru General Hospital where he was prescribed with some medication for his injured right hand but the swelling did not subside. He was given periodic medical leave continuously until 1 December 1984, when he was medically boarded out of the service.

On 27 December 1983, ie 38 days after the second accident, the plaintiff gave written notice to the defendant informing it of the two accidents. The defendant replied by letter dated 11 January 1984, forwarding a claim form for completion and return within 14 days by the plaintiff. The plaintiff was unable to complete that form as all the doctors were unable to diagnose his condition and the claim form was only returned to the defendant on 30 August 1984, with the words 'still in the ward under treatment' and signed by the orthopaedic registrar of the Johore Bahru General Hospital. The plaintiff was re-admitted to the said hospital on 17 July 1984, and was examined by a Medical Board consisting of three specialists, namely, the state physician, state surgeon and state orthopaedic surgeon, and it was not until 30 October 1984, that they certified that he was suffering from, inter alia, Sudeck's osteodystrophy which is a rare condition.

In the report of the Medical Board (p 109 of the appeal records), it was stated that the plaintiff was suffering from: (1) 'Pscudek's' osteodystrophy

— right hand; (2) cervical spondylosis; (3) labile hypertension; (4) seronegative arthritis; (5) oesophangitis; (6) duodenitis; and (7) hamorrhoid.

A copy of the Medical Board's report was forwarded to the defendant by the plaintiff's solicitors through their letter dated 31 December 1984. But prior to that, by a letter dated 16 April 1984, the defendant denied liability in respect of the first accident for failure to notify it within 14 days but expressed willingness to waive breach in respect of the second accident if the plaintiff could justify the reason for the breach. The defendant also renewed the plaintiff's personal accident policy for the period 19 June 1984 to 18 June 1985, upon payment of the premium but by another letter dated 18 October 1984, the defendant again repudiated liability in respect of the plaintiff's claim arising out of the first accident on the ground that it had not been notified of the accident within 14 days after the happening of the accident as stipulated in the policy. By another letter dated 24 July 1985, the defendant's solicitors also repudiated liability in respect of the second accident on the grounds of failure to notify it of the accident within the prescribed time and also for non-disclosure of material facts whilst completing the said proposal form. Apparently prior to the accident, the plaintiff did suffer from occasional neck pain, occasional labile blood pressure and a sensitive stomach.

The issues before the High Court

During the trial in the Johore Bahru High Court, no evidence was adduced on behalf of the defendant and the following three issues were formulated and agreed upon by both counsel for determination by the High Court [see [1990] 3 MLJ 312 at 313]:

(1) Has the plaintiff suffered bodily injury which has resulted in permanent total disablement as defined in the policy?

(2) Is the defendant entitled to repudiate the said policy on the ground of non-disclosure of material facts at the time of executing the proposal form in that the plaintiff failed to disclose that he was then allegedly suffering from various diseases?

(3) Is the defendant entitled to repudiate the plaintiff's claim on the ground of breach of policy condition, ie condition No 7, which requires notice to be given to the defendant within fourteen (14) days of any accident that is likely to give rise to a claim?

LC Vohrah J considered that it was clear from the medical evidence adduced that the onset of Sudeck's osteodystrophy resulting in the plaintiff's physical disability was caused by the injury to the right arm in direct consequence of the two accidents he was involved in within a short period. In considering whether the plaintiff's physical disability arising from Sudeck's osteodystrophy caused him permanent disablement within the meaning of the policy, the learned judge noted that the policy in a separate interpretation section differentiates disablement into three categories, ie 'Permanent Total Disablement', 'Temporary Total Disablement' and 'Temporary Partial Disablement'. 'Permanent Total Disablement' is defined as 'absolute disablement from engaging in or giving attention to profession or occupa-

tion of any kind'. 'Temporary Total Disablement' is defined as 'disablement from engaging or giving attention to any portion of the insured's ordinary profession or occupation'. 'Temporary Partial Disablement' is defined as 'partial disablement from engaging or giving attention to the insured's ordinary profession or occupation'. The learned judge was in no doubt that the plaintiff's disablement is not temporary but permanent in nature and applying the contra proferentem rule, he took the view, having regard to the definitions given, that permanent disablement as opposed to temporary disablement means permanent total disablement which prevents a person from engaging in or giving attention to 'profession or occupation of any kind'. In considering the phrase 'profession or occupation of any kind', the learned judge considered that among the authorities submitted for consideration by the court, the case of *Pocock v Century Insurance Co Ltd*[1] was directly relevant as it turned on the interpretation of comparable words. In that case, a personal accident insurance policy stated that the insurance company would pay the insured a weekly sum in respect of 'temporary total disablement from attending to business of any and every kind'. It was held that a person could not be said to attend to business simply because he was capable of doing some minor part of the work involved in that business. The learned judge agreed with the view expressed by Mr Commissioner Molony QC in that case 'that a person cannot be said to attend the business in that sense because he is capable of doing — perhaps rather badly — some minor part of the work involved in that or any other sort of business'. The learned judge referred to the evidence of a consultant orthopaedic surgeon and former Associate Professor of Orthopaedic Surgery at the University of Malaya to the effect that the plaintiff's 'condition certainly condemns him to be totally and permanently disabled'. His Lordship also stated that he was 'satisfied, after having seen the physical disability of the plaintiff for the whole duration of the trial expressing itself in the constant uncontrollable nervous twitching and flapping of the right arm, that the bodily injury suffered by the plaintiff from the two accidents causing Sudeck's osteodystrophy has resulted in his permanent total disablement from engaging in or giving attention to his occupation or to any substituted type of occupation'. He therefore held that the plaintiff had suffered bodily injury which has resulted in permanent total disablement as defined in the policy.

As regards the non-disclosure of material facts, the learned judge noted that the proposal form contained a 'basis clause' that the answers are true and that they are to be the basis of the proposed contract of insurance making the truth of the answers a condition precedent and that the plaintiff, by signing it, has signified his agreement thereto. His Lordship also noted that the plaintiff in cross-examination had admitted that he sought medical advice for the pain in his neck which was described by a surgical specialist in Singapore as 'early cervical spondylosis'. The learned judge however thought that that admission could not be considered as positive evidence that the plaintiff was in fact suffering from cervical spondylosis and, applying the 'ejusdem generis' rule, was of the view that it was a medical condition which did not require disclosure as 'any other disease' in the proposal form. The learned judge also referred to the evidence of Datuk Dr

Sarvananthan, senior consultant physician of the General Hospital, Kuala Lumpur, who had attended on the plaintiff since 1977 and had stated that the plaintiff was perfectly well until his accident in 1983, except for a sensitive stomach which was prone to gastritis. After referring to the evidence of other medical specialists, the learned judge was of the view that on the evidence presented, both oral and documentary, there was nothing to suggest that the four conditions referred to by the defendant, namely, cervical spondylosis, haemorrhoids, labile hypertension and peptic ulcer were conditions which the plaintiff was suffering from or knew or had reason to know he was suffering from when he signed the proposal form. His Lordship therefore held that the defendant was not entitled to repudiate the policy on the ground of non-disclosure of material facts.

On the third issue, the learned judge, after referring to the following condition 7 in the said policy,

> Upon the happening of any accident likely to give rise to a claim under this policy the insured shall within 14 days after the happening of the accident give notice to the company with full particulars of the accident and injuries and shall as soon as possible procure and act on proper medical or surgical advice.
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> The insured (or the insured's legal personal representatives) shall at the expense of the insured furnish to the company all such certificates information and evidence as may be required by the company and the insured shall whenever reasonably required to do so submit to medical examination on behalf to the company. In the event of the death of the insured the company shall be entitled to have a post mortem examination at its own expense and notice shall when practicable be given to the company before interment or cremation stating the time and place of any inquest appointed.

agreed with counsel for the plaintiff that the requirement of the above provision was to give notice of an accident that was likely to give rise to a claim on the part of the insured, ie one causing an injury that could be considered sufficiently serious to give rise to a claim under the policy and not to any and every accident however trivial that the insured might be involved in. His Lordship accepted the plaintiff as a truthful witness and his explanation that the reason why he notified the defendant of the two accidents beyond the 14-day period prescribed in condition 7 was because it was only after that period when the pain was getting worse that he realized that there was something wrong with his right arm which could give rise to a claim. The learned judge was referred to *Cassel v The Lancashire and Yorkshire Accident Insurance Co Ltd*[2] and noted that the policy of insurance in that case contained a proviso that the assured should give the insurers notice of the occurrence of the accident and of the injuries received within 14 days of the date of the accident. In that case, the accident was in July but the plaintiff was not aware that he had received injury until the March following when he at once gave notice to the insurers. It was held that the notice was not within the time limited by the policy and that therefore the assured was not entitled to recover. LC Vohrah J noted that the case was reported in very abbreviated form and the provisions of the proviso were not reproduced therein for satisfactory comparison to be made. He was however of the view that the provisions in condition 7 are clear and unambiguous and, upon a natural construction, held that the defendant

was not entitled to repudiate the plaintiff's claim on the ground of breach of that condition and in the result gave judgment in favour of the plaintiff for the sum of $200,000 plus an agreed sum of $2,250 as cost of medical and surgical treatment incurred with interest at 4% from the date of repudiation and costs of the suit.

The appeal

Although there were eight grounds in the memorandum of appeal, Mr Kumar, counsel for the defendant, stated that there were in fact only three issues in this case, namely, the cause of the injury, the non-disclosure of facts and the failure of the plaintiff to inform the defendant within 14 days of the accidents.

(a) Cause of the injury

As regards the first issue, counsel, after referring to the report of the Medical Board, stated that not all the conditions referred to therein were caused solely and independently by the injury sustained in the two accidents. He contended that some of those conditions were not connected to the injury sustained in the two accidents and referred to the specialist's report of Dr VK Pillay at p 98 of the appeal records and pointed out that the plaintiff had consulted that specialist in April 1981 for early cervical spondylosis which the doctor had stated was not related to his condition after the accidents. He also referred to a letter written by Datuk Dr K Sarvananthan to the branch manager of the Great Eastern Life Assurance Co Ltd (pp 106 and 107 of the appeal records), where the senior consultant physician of the General Hospital had stated that the 'haemorrhoid, cervical spondylosis and labile hypertension must have been there before the accident but were made worse by the accident'. Counsel then referred to *Jason v Batten*[3] and contended that it was applicable to this case.

As for the injury sustained by the plaintiff in the two accidents, counsel contended that it did not amount to permanent disablement. He also submitted that *Pocock*'s case[1] could be distinguished, and pointed out that the plaintiff, under cross-examination, had said that he did not work since the accident and when asked if he would do a desk or sedentary job replied that he felt miserable and so did not look for employment. It was counsel's submission that the failure on the part of the plaintiff to seek alternative employment more suited to his condition was out of choice rather than his inability to do any work. He then invited us to compare *Pocock*'s case[1] with *Fidelity & Casualty Co of New York v Mitchell*[4] and stated that in the latter case, the definition of total disability was with reference to the insured's occupation and that only inability to perform the duties pertaining to his occupation was regarded as total disability. Counsel also referred to *Williams v Lloyd's Underwriters*[5] and stated that in that case permanent total disability was defined as the inability to resume the plaintiff's normal calling or occupation of any kind. It was counsel's submission that the disability suffered by the plaintiff was neither permanent nor total as envisaged by the policy.

Mr Jagatheesan, counsel for the plaintiff, on the other hand contended that the plaintiff's injury was permanent. He also referred us to *Pocock's* case[1] and stated that it was applicable to the facts of this case. His contention was that the use of the words 'solely and independently' in the said policy showed that what is meant is that the injury was the proximate cause of the plaintiff's disablement. He also referred to the case of *Lawrence v The Accidental Insurance Co (Ltd)*,[6] in which the expression 'sole cause of death' was considered by the court. In that case, the insured, whilst at a railway station, was seized with a fit and fell forwards off the platform across the railway, when an engine and carriages which were passing went over his body and killed him. It was held that the death of the insured was caused by an accident within the meaning of the policy and that the insurers were liable. Counsel referred us specifically to the following passage in the judgment of Watkin Williams J:

> It seems to me that the well-known maxim of Lord Bacon, which is applicable to all departments of the law, is directly applicable in this case. Lord Bacon's language in his Maxims of the Law, Reg 1, runs thus:
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> > 'It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause.'
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> Therefore, I say according to the true principle of law, we must look at only the immediate and proximate cause of death, and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened.
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> ...
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> Now if the argument of the defendants be a good one, this absurdity would follow.

Counsel also referred us to the following passage in the judgment of Lord Dunedin in *Fidelity & Casualty Co of New York v Mitchell*:[4]

> This bodily injury, sustained through accidental means, and resulting in disability, must so result 'directly, independently and exclusively of all other causes.' Now the expression 'other causes' postulates a cause already specified. The word 'cause' has not, so far, been used in the sentence, and it must therefore be found in the words 'accidental means.' Therefore there must be independency between cause 1 (the accident) and cause 2, whatever that may be. But in this case, on the view of the facts taken by both courts — with which their Lordships agree, and which in any case they would be slow to disturb — there is no independency between the alleged second cause (the tuberculous state) and the first cause (the accident). Prior to the accident there was only a potestative tuberculous tendency; after it, and owing to it, there was a tuberculous condition. In other words, the accident had a double effect — it sprained the tendons and it induced the tuberculous condition. These two things acted together, and were the reason of the continuing disability; but while they are both ingredients of the disabled condition, there has been and is, on the true construction of the policy, only one cause, namely, the accident.

He then referred to the viva voce evidence of the various medical specialists and specifically to the evidence of Datuk Dr K Sarvananthan who said that

the final disability which the plaintiff suffers from arose from the injuries. That doctor also said that he was aware of the position held by the plaintiff in the Jabatan Kerja Raya and stated that the plaintiff had developed progressively increasing hypertension from January 1984 as a result of the pain, inability to sleep and mental suffering he had. The doctor also said that haemorrhoids are an inherited disorder. That and cervical spondylosis and labile hypertension were conditions unknown to the plaintiff or to him. All those latent conditions were exaggerated on the plaintiff after his accidents. We were also referred to the evidence of Dr Shanmugam s/o Subbiah, a consultant surgeon attached to Shan Surgical Specialist Hospital, Johore Bahru, where the doctor said under cross-examination that as a result of the accident and the stress the plaintiff underwent, he suffered those conditions found by the Medical Board. Counsel therefore submitted that on the evidence adduced the injury suffered was the proximate or sole and independent cause that resulted in the plaintiff's total disablement.

We note that the words used in the policy in this case were 'bodily injury... which shall solely and independently of any other cause result in his death or disablement'. We agree with Mr Jagatheesan that it is a requirement that the accident must be the proximate cause of the injury and that it is therefore necessary to discover the proximate cause of the injury and once it is found, it would also be the sole cause regardless of prior or subsequent events that may aggravate the injury.

As regards the phrase 'independently of any other cause' which is different from the words 'sole cause', reference can be made to the policy in *Fidelity & Casualty Co of New York v Mitchell*,[4] which provided that the bodily injury must result 'directly, independently and exclusively of all other causes' in total disablement from performing the duties of the assured's occupation. The insured in that case had once had a form of latent tuberculosis in his system. He accidentally sprained his wrist and would have recovered but the injury caused the tuberculosis to revive and the insured became disabled. It was held by the Judicial Committee of the Privy Council that the disablement resulted directly, independently and exclusively of all other causes and the insured could recover. Similarly in the present case the injury caused by the two accidents within a short period had two distinct effects of inducing the rare condition known as Sudeck's osteodystrophy and at the same time made the haemorrhoids, cervical spondylosis and labile hypertension worse. The case of *Jason v Batten*,[3] which was referred to by the defendant's counsel, could be distinguished as there is no exception clause in the policy in this case, and moreover in *Jason*'s case[3] the judge had held that the accident in that case was not the cause of the coronary thrombosis independently of all other causes because the arterial disease which the plaintiff had in that case was a concurrent and co-operative cause. In this case the two accidents were the cause of the plaintiff's injury and resulted in his suffering Sudeck's osteodystrophy and the cervical spondylosis, haemorrhoids and labile hypertension were not concurrent and co-operative causes and have no casual connection with the injury resulting from the two accidents.

As for the plaintiff's incapacity due to the injury, we would prefer to follow *Pocock*'s case[1] and looking at the whole policy hold that the defini-

tions section therein, in particular that clause defining permanent total disablement as 'absolute disablement from engaging in or giving attention to profession or occupation of any kind', should be understood in the context of the actual business or occupation of the plaintiff. Moreover it is quite clear from the evidence in this case that the plaintiff would never again be able to resume his occupation as a technical assistant in the Jabatan Kerja Raya and was therefore permanently and totally disabled within the meaning of the policy.

Having considered the evidence and the submissions of counsel on the first issue, we would agree with the learned judge's finding that the bodily injury suffered by the plaintiff was solely and independently caused by the two accidents in the sense that they were the proximate cause of his permanent total disablement in this case and had prevented him from continuing his occupation as a technical assistant in the Jabatan Kerja Raya.

(b) Non-disclosure

On the non-disclosure of material facts, Mr Kumar referred us to the relevant question in the proposal form and also to the evidence of the plaintiff under cross-examination when he said that prior to the accidents, he had suffered none of the seven medical conditions except for the pain in the neck when he drove. Counsel also referred to the specialist's report of Dr VK Pillay, in which the doctor stated that the plaintiff had consulted him in April 1981 for early cervical spondylosis. He also referred to a letter by the consultant surgeon of the Johore Bahru General Hospital (p 105 of the appeal records) to the Great Eastern Life Assurance Co Ltd, in which the consultant surgeon had stated that the presence of the first degree haemorrhoids before the accident was elicited from a clinical history from the plaintiff himself. Counsel then referred to the judgment of LC Vohrah J and contended that the learned judge had wrongly applied the 'ejusdem generis' rule in this case. It was contended that as the plaintiff was aware that he was suffering from cervical spondylosis, haemorrhoids, labile hypertension and peptie ulcer prior to his signing the proposal form in 1983, he has failed to disclose them in the proposal form.

On this issue, Mr Jagatheesan stated that the onus of proof of non-disclosure of material facts was on the defendant and that it was only necessary for the plaintiff to disclose any disease suffered by him. He referred to a letter by Dr Annamalai, consultant orthopaedic surgeon, to the Great Eastern Life Assurance Co Ltd (p 108 of the appeal records), in which it was pointed out that Sudeck's osteodystrophy, cervical spondylosis and arthritis were conditions which were not noted prior to the day of the accident on 29 October 1983. The doctor also stated that Sudeck's osteodystrophy is a consequence of the accidental injuries. Counsel then stated that cervical spondylosis is not a disease and contended again that a disease must be of a serious nature before it must be disclosed in the proposal form. He stated that it is a general principle that a fair and reasonable construction must be placed on the questions in the proposal form and on the answers which the insured had given to them. Counsel then referred to the following passage in the judgment of Sir Robert P Collier in *Connecticut Mutual Life Insurance Co of Hertford v Moore*[7] at p 648:

> They could not reasonably expect a man of mature age to recollect and disclose every illness, however slight, or every personal injury, consisting of a contusion, or a cut, or a blow, which he might have suffered in the course of his life. It is manifest that this question must be read with some limitation and qualification to render it reasonable; and that personal injury must be interpreted as one of a somewhat serious or severe character.

Counsel then referred us to the following footnote on the 'ejusdem generis' rule appearing at p 310 of ER Hardy Ivamy on the *General Principles of Insurance Law* (2nd Ed):

> In the question 'Have you had chronic dyspepsia or any other disease?' the word 'disease' refers to maladies as serious as chronic dyspepsia or which might, in the way it might, increase the risk, and does not include attacks of acute dyspepsia or ordinary indigestion: *IOF v Turmelle* (1910) QR 19; KB 261 (life insurance) where the further question 'For what disease or diseases have you consulted a physician?' was construed in accordance with the same principle. *Sun Fire Office v Hart* (1889) 14 App Cas 98, PC (fire insurance) per Lord Waton at p 103:
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> > 'It is a well-known canon of construction that where particular enumeration is followed by such words as 'or other' the latter expression ought, if not enlarged by the context, to be limited to matters ejusdem generis with those specially enumerated. The canon is attended with no difficulty except in its application. Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter and context of the clause under construction.'

It was counsel's contention that a fair and reasonable construction must be adopted on the questions in the proposal form and the answers by the insured to the questions. In this case, the relevant question dealt with a multitude of serious illnesses and then finishes with the words 'or any other disease'. It was therefore submitted that a reasonable construction of that question must be that it referred only to serious illnesses of which the plaintiff was aware. Counsel stated that it was agreed that the plaintiff had piles and cervical spondylosis but stated that they were not diseases or serious ones, and then referred to *Joel v Law Union And Crown Insurance Co*[8] as authority for the contention that the defendant by the question for information of a specific sort has relieved the plaintiff from the obligation to disclose facts which are not within the scope of that question.

On this score, we disagree with the contention of Mr Kumar that the learned judge had wrongly applied the 'ejusdem generis' rule. We note that no evidence was adduced by the defence nor any questions asked, especially by the defence, as to whether cervical spondylosis or the other three conditions were diseases and, if so, whether they were of a serious nature. We also note that the word 'disease' has not been specifically defined in the said policy. Looking at the diseases referred to in question 11(a) of the said proposal form, we are of the view that the defence has not shown nor do we think that any of the four conditions referred to by the defence are of the same genus as those mentioned in the said question and are as serious as cancer, tuberculosis or any disorder or disease of the mental, nervous, urinary, digestive and cardio-vascular systems, Applying a fair and reasonable construction on that question in the proposal form, we therefore do

not consider as a matter of fact that it was material for the plaintiff to have disclosed in the proposal form that he had early cervical spondylosis, haemorrhoids, labile hypertension or peptic ulcer as they are not serious diseases or illnesses of the same genus as those mentioned earlier on in the said question. Here again we agree with the learned judge that the defendant was not entitled to repudiate the policy on the ground of non-disclosure of material facts; and in this regard we would refer to and adopt the following dictum of Fletcher Moulton LJ in *Joel v Law Union and Crown Insurance Co*[8] on a question requiring an insured to warrant his opinion which we consider is equally applicable in this case when the plaintiff was required in the said question 11 to answer 'to the best of (his) knowledge and belief':

> For instance, one of the commonest of such questions is, 'Have you any disease?' Not even the most skilled doctor after the most prolonged scientific examination could answer such a question with certainty, and a layman can only give his honest opinion on it. But the policies issued by many companies are framed so as to be invalid unless this and many other like questions are correctly — not merely truthfully — answered, though the insurers are well aware that it is impossible for any one to arrive at anything more certain than an opinion about them. I wish I could adequately warn the public against such practices on the part of insurance officers.

(c) Conditions in the policy

Finally on the third issue, Mr Kumar again referred to condition 7 in the said policy and to *Cassel v The Lancashire and Yorkshire Accident Insurance Co (Ltd)*[2] and contended that the plaintiff was in breach of that condition. He also pointed out that even medical opinion was divided regarding the injury suffered by the plaintiff.

Mr Jagatheesan, after referring to the said condition, stated that the defendant was notified about the accidents but conceded that the plaintiff was out of time. However he contended that the condition was not a condition precedent to the claim and pointed out that where the stipulation as to time is not made a condition precedent, a failure to give notice within the prescribed time will not preclude the assured from recovering, provided that he does in fact give notice at some time or other to the insurers as was done in this case. He referred to *Stoneham v The Ocean, Railway & General Accident Insurance Co*,[4] in which the assured was accidentally drowned in Jersey. It was impossible to give notice within seven days. In an action on the policy, it was held by the Queen's Bench Division that the accident happened within the United Kingdom and that notice was not a condition precedent to the right to recover and the insurers were liable. Counsel also contended that the defendant should not use condition 7 to its advantage, and after referring to the said condition itself, stated that the plaintiff in any case need only inform the defendant of any accident that is *likely to give rise* to a claim. He contended that the injury suffered by the plaintiff was not in fact one that was likely to give rise to a claim, and again referred to the evidence of the plaintiff that after the two accidents he only realized that there was something serious three weeks after the second accident when the

pain was getting severe and therefore notified the defendant on 27 December 1983. Counsel contended again that the contra proferentem rule should be applied in the plaintiff's favour.

We have read the conditions in the said policy (p 95 of the appeal records) and find that unlike in *Cassel's* case,[2] the condition as to the giving of notice has not been made a condition precedent to the liability of the defendant. In particular, we find that condition 7 was not made a condition precedent in that it is not stated that the giving of notice within 14 days by the insured shall be a condition precedent to any liability of the company to make any payment under the said policy. We agree with the learned judge that by applying the contra proferentem rule, the court should construe condition 7 against the defendant. We note that it is not stated that the giving of notice within 14 days is to be a condition of liability nor is there any stipulation that if no notice is given the policy shall be void. It would appear from condition 7 that it was intended to save the defendant from extra expenses which it would incur if it had to investigate the circumstances of accidents at long intervals after their occurrences. In this case, following *Stoneham's* case,[9] on consideration of the terms of the said policy, in particular condition 7 therein, we consider that the defendant has failed to show that condition 7 has been made a condition precedent to its liability and the plaintiff is therefore not precluded from recovering under the said policy.

For all the reasons stated above, we would therefore dismiss this appeal with costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim